IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.10.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Writ Appeal No.2942 of 2001

V.C.Mohan Appellant (2nd Respondent)

v.

1. The Commissioner of Customs (AIR)
   Customs House, Chennai - 1

2. The Customs and Central
   Excise Settlement Commission
   Chennai

3. M/s.Moonstar Automation Private Limited
   rep.by its Managing Director
   V.C.Mohan
   120L, Wallajah Road
   Pazal Complex, Mount Road
   Chennai - 600 002.

4. S.Janakiraman Respondents (Petitioner & Respondent 1,3 & 4)

Writ Appeal filed against the order dated 18.10.2001 passed by the singe Judge in W.P.No.11519 of 2001. Presented to this Court under Article 226 of the Constitution of India to issue a writ of certiorari calling for the records relating to the Admission order No.3/2001 (CUS) dated 15.2.2001 passed by the 1st respondent in the application filed by Respondents 2 to 4 quash the same.

For appellant : Mr.C.Natarajan,
Sr.Counsel for
Ms.R.Swarnalatha

For Respondent No.1 : Mr.V.T.Gopalan,
Addl.Solicitor General
assisted by Mr.P.Wilson
Asst.Solicitor General

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

JUDGMENT

K.RAVIRAJA PANDIAN, J.

The appeal is filed against the order of the learned single Judge dated 18.10.2001 made in W.P.No.11519 of 2001 whereby the learned single Judge allowed the writ petition filed by the first respondent herein against the admission order of settlement commission dated 15.2.2001 on an application filed by the appellant herein under Section 127-B of the Customs Act, 1962 for settlement of case.

2. The brief facts of the case are as follows:

The appellant herein filed bill of entry NO.235337 dated 19.7.2000 in the name of one M/s. Goutham Enterprises for clearance of 300 numbers of Acer CD ROM drive, 50 X, through clearing house agent M/s.Sanjay Forwarders Private Limited. The declared value was Rs.4,71,450/- (CIF). On the same day i.e., on 19.7.2000, M/s.Goutham Enterprises sent a letter to the Assistant Commissioner of Customs, SIIB Air Cargo Complex, Chennai stating that they have received a cargo arrival notice for ACER CD ROM drive, 50X and they had not placed any order for supply of the same.

3. On 24.7.2000, the appellant - Managing Director of Moonstar Automation Private Limited claimed the goods. The goods were examined in the presence of the appellant and one Shanthilal of Goutham Enterprises and two independent witnesses. The consignment found to contain 246 Nos. of Acer 50X CD ROM drive, 736 Nos. of Cellular mobile phones with chargers and battery back, 35 Nos. of Ear phones and 100 Nos. of plastic flip top and 6 Nos. of hard disc drive for a total CIF value of Rs.43,56,189/-. Since the description and the value of the goods did not tally with the bill of entry, the consignment was seized on 24.7.2000 under a mahazar. The SIIB of the Customs House, Chennai conducted further investigation by recording statements from the appellant, clearing house agent, the steamer agent and one S.Janakiraman. After gathering such information on 19.9.2000, the first respondent issued a show cause notices to the appellant calling upon the appellant to show cause as to why:-

> (i) the value of the goods should not be revised to Rs.43,56,189/ (CIF) and Rs.57,87,200/- (Market value) from Rs.4,71,450/- (CIF).
>
> (ii) the goods should not be confiscated under Section 111(i) (l) and (m) of the Customs Act, 1962?
>
> (iii) penalty should not be imposed on the appellant under Section 112(a) of the Customs Act, 1962?"

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

4. After the receipt of the show cause notice, the appellant filed an application before the Settlement Commission under Section 127-B of the Act for settlement of the case. The Settlement Commission called for a report from the Commission of Customs as required under Section 127-C. The Commissioner (AIR) furnished his report dated 17.1.2001 in which it was stated that prima facie, the case was outright smuggling and the appellant in order to escape from prosecution and other penalties approached the Settlement Commission. The goods seized might be confiscated absolutely. The application of appellant was not fit case for settlement.

5. The Settlement Commission in its order dated 15.2.2001 by meeting all the points raised by the Commissioner (AIR), has concluded that the appellant was entitled to have the dispute settled under Section 127-B of the Act. The first respondent aggrieved by that order of admission so made filed writ petition in W.P.No.11519 of 2001 seeking for quashing of the admission order dated 15.2.2001 of the Settlement Commission. The learned single Judge by order dated 18.10.2001 quashed the order impugned therein on the ground that the application filed by the appellant for settlement of case before the second respondent would not be legally sustainable as the case would not fall within the ambit of Section 127-B of the Act and the order impugned therein allowing the application under Section 127-C of the Act could not be legally sustainable. The correctness of the said order is agitated in this appeal.

6. Learned counsel appearing for the appellant contended that the application filed by the appellant under Section 127-B would meet all the requirements as envisaged in the above provision in the given facts and circumstances of the case and the appellant is entitled to have the dispute settled under Section 127-B of the Customs Act.

7. On the other hand, the Additional Solicitor General appearing for the first respondent contended that the scheme of settlement, particularly, the provision under this Chapter XIV-A would apply only to the bonafide importer, who admits the short levy on account of mis-classification or otherwise of the goods, but not apply to the person like the appellant, who has calculatedly filed the bill of entry in the name of third person and sought to evade the duty legally payable for clearance of the goods. The action of the appellant is nothing but smuggling the goods into India without payment of duty, which would not in any way come within the purview of Section 127-B or 127-C. If the duty evaders like that of the appellant are allowed to settle the case before the Settlement Commission, then the other provisions - Sections 110 and 111 would virtually become meaningless. The order of the learned single Judge requires no re-consideration.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

8. We have heard the argument of the learned counsel on either side and perused the materials on record.

9. The point to be resolved in this case is, whether in the facts and circumstances of the case, the power conferred on the Settlement Commission under Section 127-B would include the case of the present nature, so as to have the case settled before the Settlement Commission.

10. Chapter XIV-A of the Act provides for "Settlement of Cases". Section 127-A defines certain terms under Chapter XIV-A. Sub-clause (b) of Section 127-A defines the term "case" means any proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before a proper officer or the Central Government on the date on which the application under sub-section (1) of Section 127-B is made.

11. Section 127-B provides for making an application for settlement of cases. The conspectus of the provision or the requirement of the said provision can be reduced as follows on a reading of it:

(i) An importer or an exporter or any other person can file an application for settlement of case (hereinafter called "applicant");

(ii) That application can be filed at any stage of the case relating to the applicant;

(iii) The application so made shall be in such form and such manner specified by Rules (Rule 3 of the Customs (Settlement of Cases) Rules, 1999;

(iv) The application shall contain:-

(a) a full and true disclosure of the applicant's duty liability, which has not been disclosed before the proper officer and the manner in which such liability has been incurred;

(b) The additional amount of customs duty accepted to be payable;

(c) Such other particulars as may be specified by Rules including the particulars of such dutiable goods in respect of which the applicant admits short levy on account of mis-classification or otherwise of the goods.

The proviso appended to Section 127-B provided for conditions in order to maintain an application under Section 127-B(1), which are:-

(i) The applicant should have filed a bill of entry, or a shipping bill, in respect of import or export of goods;

(ii) A show cause notice should have been issued by the proper officer in relation to the bill of entry filed

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

by the applicant;

(iii) The additional amount of duty accepted by the applicant in his application should exceed two lakh rupees;

(iv) The application under Section 127-B(1) cannot be entertained in respect of cases, which are pending before Appellate Tribunal or Court;

(v) No application shall be made in relation to the goods to which Section 123 applies;

(or)

to goods in relation to which any offence under Narcotic Drugs and Psychotropic Substances Act, 1985 has been committed;

(vi) No application shall be made for interpretation of the classification of the goods under Customs Tariff Act, 1975;

(vii) Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under Section 110, the application could be filed only after the expiry of 180 days from the date of seizure (sub-section (2));

(viii) Every such application shall be accompanied by such fee specified by Rules;

(ix) An application filed shall not be allowed to be withdrawn."

12. Now, let us consider whether the facts of the case come within the above requirement of the statutory provisions. As stated supra, a show cause notice dated 19.9.2000 has been issued under Section 124 of the Customs Act against the appellant by the proper officer. The relevant clauses in the show cause notice are as follows:

(a) the goods filed under Bill of Entry No.235337 dated 19.7.2000 do not conform to the declaration made in the bill. As against the declaration of 300 Nos of Acer CD ROM Drives valued at Rs.4,71,450/- (CIF), the examination of the same revealed that the contents to be Mobile Phones of various models, HDD in addition to what was declared and totally valued at Rs.43,56,189/- (CIF) and Rs.57,87,200/- (market value).

(c) V.C.Mohan (The appellant) of M/s.Moon Star Automation P.Ltd. is the actual importer of the goods covered under the above said Bill of Entry. He has appeared before the department on 24.07.2000 and claimed the goods, presented himself during the examination and has accepted that he has imported the goods in the name of M/s.Goutham Enterprises to avoid the clutches of law if caught.

(j) Shri V.C.Mohan (the appellant) has attempted to clear the consignment covered under Bill of Entry no.235337 dated 19.07.2000 by grossly mis-declaring the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

contents and filling the Bill in the name of other importer without their knowledge. By doing so, he has violated the Section 46(4) of the Customs Act, 1962. Further, the goods are liable for confiscation under Sec. 111(i) (l) and (m) of Customs Act, 1962 and he is liable for penalty under Sec.112 of Customs Act, 1962.

13. Thus, it is the specific stand of the first respondent that the appellant Mohan is the importer of the goods covered under the Bill of Entry filed by him in the name of Goutham Enterprises. Hence, condition No.(i) of Section 127-B(1) is complied with. Immediately after the show cause notice, the appellant filed the application for settlement of case. It is permissible under condition No.(ii) of the main provision.

14. As could be seen from the application filed by the appellant in form SC(C)-1 under Rule 3 of the Customs (Settlement of Cases) Rules, 1999, which is made available at page No.10 of the typed set of papers, the applicant has filed the application as per the form set out under Rule 3 of the Rules, 1999. So, condition No.(iii) is also complied with. In that application, the appellant made a full and true disclosure of his duty liability, which has not been disclosed before the proper officer and the manner in which such liability has been incurred and the additional amount of customs duty accepted to be payable by him has also been furnished and as a matter of fact has been paid. Thus, sub-conditions (a) and (b) of condition No.(iv) have also been complied with. Sub-condition No.(c) i.e., such other particulars as may be specified by Rules including the particulars of such dutiable goods in respect of which the applicant admits short levy on account of mis-classification or otherwise of the goods, is not applicable rather put against the appellant, as there is no provision specifically contained in the Customs (Settlement of Cases) Rules, 1999. Thus, all the conditions of the main provision of Section 127-B(1) have been complied with in this case.

15. Now, reverting to the conditions stipulated in the proviso, which are extracted supra, it is an admitted fact by the respondent themselves that the appellant had filed bill of entry in respect of import of goods, as could be seen from the extracted portion of the show cause notice. So, condition No.(i) of the proviso has been complied with. The proper officer has also issued a show cause notice dated 19.9.2000 in relation to the bill of entry filed by the appellant. As such, condition No. (ii) contemplated in the proviso has also been complied with. Admittedly, in this case, the additional amount of duty accepted by the appellant in his application exceeds Rs.2 lakhs. Hence, condition No.(iii) of the proviso has also been complied with. No case is pending either before the Appellate Tribunal or before the Court in respect of the disputed bill of entry. Hence, condition No.4 of the proviso has also been complied with. The

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

condition No.(v) that no application shall be made in relation to the goods to which Section 123 applies is not applicable to the facts of the present case, as the goods involved in this case are not the goods in relation to which Section 123 applies. The goods in relation to Section 123 applies, are (1) Cigarettes, (2) Transistors and Diodes, (3) Synthetic yarn and Metallic yarn, (4) Fabrics made wholly or mainly of Synthetic yarn, (5) Cassette Tape Recorders, (6) Electronic Calculators and (7) Whisky. (vide Notification No.52 – Customs dated 27th March, 1968 as amended by Notification No.76-Customs dated 10th October, 1974.). The goods in relation to Section 123 applies are enumerated in the subsequent Customs Notification No.204-Customs dated 20-7-1984 as amended by Notifications No.262/84-Customs dated 23-10-1984, No.28-90-Customs (N.T.), dated 8-6-1990 and No.4/93-Customs (N.T.), dated 15.1.1993.). They are :

1 to 3 : Omitted
4 : Synthetic yarn and Metallised yarn.
5 : Fabrics made wholly or mainly of synthetic yarn.
6 : Omitted
7 : Electronic Calculators
8 : Omitted.
9 : Watches, watch movements (including partly assembled movements), dials and cases for watches
10 : Zip fasteners
11 : Omitted
12 : Omitted
13 : Silver bullion.”

The goods involved in the present case is also not in relation to which any offence under Narcotic Drugs and Psychotropic Substances Act, 1985 has been committed. Hence, condition No.(v) of the proviso is also not applicable to the facts of the present case. Further, the application has not been made for interpretation of the classification of the goods under the Customs Tariff Act, 1975. Hence, condition No.(vi) of the proviso is also not applicable.

16. Condition No.(vii) of the proviso requires that where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under Section 110, the application for settlement can be filed only after the expiry of 180 days from the date of seizure (sub-section (2)). In this case, the dutiable goods has been seized on 24.7.2000. However, the application has been made by the appellant within a period of six months. In the case of NARSINGH DAS TAPADIA reported in 2000 SCC (CRI) 1326, the Supreme Court has held that such an application would not vitiate the proceedings. Hence, on that ground, the appellant cannot be non-suited.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Conditions Nos.(viii) and (ix) of the proviso have not been infringed in this case. Hence, all the requirements as contemplated under Section 127-B and the proviso thereto have been complied with.

As stated above, condition No.(vii) of the proviso which speaks about the dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under Section 110, the application could be filed after the expiry of 180 days from the date of seizure is a pointer to come to the conclusion even for the goods seized under Section 110, which are liable for confiscation under the Customs Act, are not taken out of the purview of Section 127-B of the Act. The term "smuggling" in relation to any goods is defined under Section 2 (39) to mean any act or omission which will render such goods liable for confiscation under section 111 or section 113. Section 111 provides for confiscation of improperly imported goods and Section 113 provides for confiscation of goods attempted to be improperly exported. In order to confiscate the goods, the Act provides for issuance of show cause notice under Section 124.

17. It is also pertinent to note here that the show cause notice dated 19.9.2000 has been issued under Section 124 of the Customs Act for confiscation of the goods under Section 111(i) (l) and (m) and imposition of penalty. Section 125 of the Customs Act provides whenever confiscation of any goods is authorised by the Customs Act, the Officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation, such fine as the said officer thinks fit. The proviso to Section 125 provides that such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon. Sub-section (2) of Section 125 casts an obligation on the owner of the goods that in addition to the redemption fine he is liable to pay any duty and charges payable in respect of such goods. Hence, we are of the view that even a show cause notice issued under Section 124 for confiscation of goods under Section 111(i) (l) and (m) is not outside the purview of Section 127-B.

18. A contention has been raised on behalf of the Department that under Section 127-A, the terminology "case" has been defined to mean "any proceeding under this Act or any other Act for the levy, assessment or collection of customs duty or any proceeding

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

by way of appeal or revision in connection with such levy, assessment or collection, which may be pending before the proper officer or Central Government, can only be regarded as a case coming within the purview of Section 127-B since the present case is one of prima facie smuggling, there is no question of levy, assessment and collection of customs duty and as such the dispute will not come within the purview of Section 127-B, which contention was found in favour of the Department by the learned single Judge. We are not able to countenance this contention also for the reason that as per second limb of Section 125 of the Customs Act, if the goods confiscated are not prohibited goods, an option has to be given to the importer to pay, in lieu of confiscation, such fine i.e., the redemption fine. In such case, the importer has to pay duty and charges payable in respect of such goods. In order to arrive at the duty and charges payable under Section 125, an assessment has to be made, the duty has to be levied and collection has to be made for the purpose of giving effect to the second limb of Section 125. For the aforesaid reasons, the contention that the dispute in the present case does not involve levy, assessment and collection has to be rejected and the same is rejected. The Division Benches of the Bombay High Court in the case of UNION OF INDIA VS. HOGANAS INDIA LIMITED reported in 2006 (199) E.L.T. 8 and TATA TELESERVICES (MAHARASHTRA) LIMITED VS. UNION OF INDIA reported in 2006 (201) E.L.T. 529 have also taken a similar view with which we are in complete agreement.

19. The learned single Judge has relied on the decision of the Supreme Court rendered in some what comparable provisions of the Income-tax Act under Section 245-AB in the case of COMMISSIONER OF INCOME-TAX, MADRAS VS. EXPRESS NEWS PAPER reported in (1994) 2 SCC 374 and with reference to Section 245-D, which provides for procedure on receipt of application under Section 245-C in KULDEEP INDUSTRIES CORPORATION VS. INCOME-TAX OFFICER reported in AIR 1997 SUPREME COURT 3631, and arrived at a conclusion that the Settlement Commission is vested with power to entertain an application only from a person, who bona fide misclassified the goods imported and disclosed the same to the Department even before the Department investigated and deducted the concealment. If the concealment has been investigated and deducted by the Department, the importer cannot be considered as a person bona fide misclassified the goods and he is not entitled to have a case settled before the Settlement Commission. We are afraid that the said decision of the Supreme Court judgment can be made applicable to the provisions contained in the Customs Act.

20. It is to be seen that the situations are totally different in the Supreme Court cases, in the sense, that the Supreme Court considered the provisions of the Income-tax Act, as they were obtaining during the relevant period 1978 and 1979 i.e., prior to the amendment incorporated in the year 1991, which

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

is amply clear from paragraph No.15 of the Express News Paper case ((1994) 2 SCC 374), wherein it has been categorically stated that it was not necessary to notice the effect of the legislative change brought about in 1991. The amendment incorporated in the provision in the year 1991 has completely changed the law, which fact has not been brought to the notice of the learned single Judge. Further, there is a clear distinction in the Income-tax Act provisions and provisions contained in the Customs Act. In the Income-tax law, application for settlement must be made before the investigation has started or before the statutory authority has collected any material or any notice is issued to the applicant. Further there must be a voluntary aspect in the disclosure of fact in concealment. On the contrary, in the provisions of the Customs Act, it is mandatory that the applicant could file an application only after show cause notice is issued, which show cause notice would pertain even for confiscation of goods on the ground of fraud or smuggling or deliberate mis-declaration. Such show cause notice is condition precedent before making an application. Having regard to the above statutory ingredient, there could never be any case of filing of an application under Section 127-B before initiation of any action by the Department or of voluntary aspect under the Customs Act.

21. Section 127-C of the Act provides for the procedure to be followed by the Settlement Commission and power has been vested with the Settlement Commission to order provisional attachment for protecting the interest of the revenue under Section 127-D. Even power has been vested on the Settlement Commission to re-open the completed proceedings under Sections 127-E and F. Under Section 127-H, power is vested with the Settlement Commission even to grant immunity from prosecution. In cases of non-cooperation by the applicant, under Section 127-I, power is also vested with the Settlement Commission to send back the case to the proper officer for adjudication in the main stream proceedings. On a reading of the entire provisions contained in Chapter XIV-A "Settlement of Cases", and taking note of the objects of the Chapter to settle all the cases in which several crores of rupees of duty locked up in dispute so as to enable the Department to recover such duty in dispute in all possible ways at an early time to the coffer of the revenue, we are of the view that even the cases in which fraud or smuggling or deliberate mis-declaration has been alleged against the importer can very well come within the purview of Section 127-B for the purpose of settlement of cases, if the conditions stated are satisfied.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

22. For all the above reasons, the order of the learned single Judge is set aside and the appeal is allowed and the order of the Settlement Commission, which is impugned in the writ petition, is restored. However, there is no order as to costs.

usk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Commissioner of Customs (AIR)
   Customs House, Chennai - 1

2. The Customs and Central
   Excise Settlement Commission
   Chennai

+ 1 cc to Mr. P. Wilson, Asst Solicitor General SR No. 63981

BV(CO)
SR/1.11.2007

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/